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No. 99-

IN THE

Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

Petitioners,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a non-fiduciary party in interest with respect to an employee benefit plan that engages in a prohibited transaction, as defined in Section 406(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106(a)(1), with the plan can be sued under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for "appropriate equitable relief," including restitution.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The petitioners in this case are Harris Trust and Savings Bank, not individually but solely as Trustee for the Ameritech Pension Trust, and Ameritech Corporation. Petitioners were plaintiffs in the District Court and appellees in the Court of Appeals.

Salomon Brothers Inc and Salomon Brothers Realty Corp. were defendants in the District Court and appellants in the Court of Appeals.

There were no other parties in the Court of Appeals.

Petitioner Harris Trust and Savings Bank is wholly owned by Harris Bankcorp Inc., which is in turn wholly owned by Bankmont Financial Corp., which is in turn wholly owned by the Bank of Montreal, whose stock is publicly traded.

Petitioner Ameritech Corporation, whose stock is publicly traded, has no parent company, nor does any publicly held company own 10% or more of Ameritech's stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Parties in Interest and Prohibited Transactions 3

B. ERISA § 502(a)(3) 5

C. The Facts 6

D. The Proceedings Below 8

REASONS FOR GRANTING THE PETITION 9

A. The Circuit Courts Are Split 9

B. The Question Presented Is of the Utmost Importance to the Administration of Employee Benefit Plans and the Vindication of Plan Beneficiaries' Rights 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Anderson v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986) 6

Aull v. *Cavalcade Pension Plan*, 988 F. Supp. 1360 (D. Colo. 1997) 16

Burlington Industries, Inc. v. *Ellerth*, 118 S. Ct. 2257 (1998) 6

Call v. *Sumitomo Bank*, 881 F.2d 626 (9th Cir. 1989) 10

Commissioner of Internal Revenue v. *Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993) 3, 5; 15, 16

Concha v. *London*, 62 F.3d 1493 (9th Cir. 1995), *cert. dismissed*, 517 U.S. 1183 (1996) 10

Cosgrove v. *Circle K Corp.*, 915 F. Supp. 1050 (D. Ariz. 1995) 10

Damasco & Associates 401(k) Profit Sharing Plan v. *Manufacturers Life Insurance Co.*, 1999 U.S. Dist. LEXIS 13654 (N.D. Cal. Aug. 20, 1999) 10

Dietz v. *Cahill*, 935 F. Supp. 223 (W.D.N.Y. 1996) 10

Dole v. *Compton*, 753 F. Supp. 563 (E.D. Pa. 1990) 10

Erlenbaugh v. *United States*, 409 U.S. 239 (1972) 13

Framingham Union Hospital v. *Travelers Insurance Co.*, 744 F. Supp. 29 (D. Mass. 1990) 10

Herman v. *South Carolina National Bank*, 140 F.3d 1413 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999) 10, 12, 13, 17, 18

Herman v. *Wolfe*, 1998 U.S. Dist. LEXIS 980 (N.D. Ill. Jan. 22, 1998) 10

John Hancock Mutual Life Insurance Co. v. *Harris Trust & Savings Bank*, 510 U.S. 86 (1993) 19

Landwehr v. *DuPree*, 72 F.3d 726 (9th Cir. 1995) 10, 16, 20

LeBlanc v. *Cahill*, 153 F.3d 134 (4th Cir. 1998) 10, 12, 13, 16, 18, 20

Liss v. *Smith*, 991 F. Supp. 278 (S.D.N.Y. 1998) 10

Lockheed Corp. v. *Spink*, 517 U.S. 882 (1996) 9, 16, 18

Mason Tenders District Council Pension Fund v. *Messera*, 958 F. Supp. 869 (S.D.N.Y. 1997) 10

McDougall v. *Donovan*, 539 F. Supp. 596 (N.D. Ill. 1982) 10, 15

Mertens v. *Hewitt Associates*, 508 U.S. 248 (1993) 9, 13, 16, 17, 18, 20

Nieto v. *Ecker*, 845 F.2d 868 (9th Cir. 1988) 10, 15, 20

Quint v. *Freda*, 1999 U.S. Dist. LEXIS 1384 (S.D.N.Y. Feb. 10, 1999) 10

Reich v. *Compton*, 57 F.3d 270 (3d Cir. 1995) 9, 15, 16, 20

Reich v. *Lancaster*, 843 F. Supp. 194 (N.D. Tex. 1993) 10

Reich v. *Polera Building Corp.*, 20 Empl. Ben. Cas. 1100 (S.D.N.Y. Feb. 9, 1996) 10

Reich v. *Rowe*, 20 F.3d 25 (1st Cir. 1994) 9, 13, 16

Reich v. *Stangl*, 73 F.3d 1027 (10th Cir.), *cert. denied*, 519 U.S. 807 (1996) 10, 12, 15, 16, 19, 20

Steen v. *John Hancock Mutual Life Insurance Co.*, 106 F.3d 904 (9th Cir. 1997) 10

United States National Bank of Oregon v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993) 19

Varity Corp. v. *Howe*, 516 U.S. 489 (1996) 13, 19

FEDERAL STATUTES AND LEGISLATIVE MATERIALS

Internal Revenue Code § 4975, 26 U.S.C. § 4975 ..... 2, 4, 5, 14, 15, 17, 21

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 8

ERISA § 3(14), 29 U.S.C. § 1002(14) 2, 4, 6

ERISA § 3(21), 29 U.S.C. § 1002(21) 2, 6, 7

ERISA § 405, 29 U.S.C. § 1105 17

ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1) ..... *passim*

ERISA § 408(a), 29 U.S.C. § 1108(a) 2, 4, 14

ERISA § 409, 29 U.S.C. § 1109 17

ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) 17

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3) ..... *passim*

ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5) 2, 6, 9, 13, 15, 20

ERISA § 502(e), 29 U.S.C. § 1132(e) 22

ERISA § 502(i), 29 U.S.C. § 1132(i) 2, 5, 14, 17, 21

ERISA § 514, 29 U.S.C. § 1144 21

ERISA § 3003(b), 29 U.S.C. § 1203(b) 5

H.R. 2, § 503(e), 93d Cong., 2d Sess. (as passed by the House on Feb. 28, 1974) 19

H.R. 2, § 511, 93d Cong., 2d Sess. (as passed by the Senate on Mar. 4, 1974) 18

H.R. 2, § 693, 93d Cong., 2d Sess. (as passed by the Senate on Mar. 4, 1974) 19

S. (Conf.) Rep. No. 1090, 93d Cong., 2d Sess. (1974) 13

H.R. (Conf.) Rep. No. 1280, 93d Cong., 2d Sess. (1974) 19

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners Harris Trust and Savings Bank and Ameritech Corporation hereby petition this Court to grant a writ of certiorari to review the decision below of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit held that a non-fiduciary party in interest with respect to an employee benefit plan cannot be required under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3), to disgorge ill-gotten gains that it realizes by entering into a prohibited transaction, as defined in ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), with the plan. The decision places the Seventh Circuit squarely in conflict with all six of the other circuit courts that have addressed this key question regarding the law applicable to employee benefit plans. Certiorari should be granted to resolve the circuit split on this question, which

is critical to the proper protection of employee benefit plans and their participants and beneficiaries. Clarity and nationwide uniformity of law on this issue are extremely important.

OPINIONS BELOW

The opinion of the Court of Appeals, App. 1a-13a, is reported at 184 F.3d 646. The memorandum decision of the District Court, App. 14a-55a, as modified, App. 56a, is not reported. The opinions of the District Court denying reconsideration, App. 57a-61a, and certifying the issue presented here for interlocutory appeal to the Court of Appeals, App. 62a-65a, are also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1999. The opinion indicated that, because the holding created a circuit split, the opinion had been circulated among all judges of the court in regular active service as required by Seventh Circuit Rule 40(e), and a majority of the judges had voted not to rehear the case en banc. App. 13a n.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 3(14), 3(21), 406(a)(1), 408(a), 502(a)(3) and (5), and 502(i) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(14), 1002(21), 1106(a)(1), 1108(a), 1132(a)(3) and (5), and 1132(i), and Section 4975 of the Internal Revenue Code, 26 U.S.C. § 4975, are reproduced in relevant part at App. 66a-77a.

STATEMENT OF THE CASE

A. Parties in Interest and Prohibited Transactions

One of the fundamental purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") is to protect employee benefit plan assets – and thereby the benefit security of plan participants and beneficiaries – by prohibiting certain transactions that carry a risk of self-dealing, unfairness or abuse. Rather than follow the common law, which required case-by-case determinations of whether transactions were at arm's-length and their terms were fair,[1] Congress adopted a strategy of broadly prohibiting a list of types of transactions between plans and "parties in interest," and then providing for exemptions – either by statute or by administrative action – where Congress or the pertinent agency concludes that an exemption is justified.

ERISA's basic definition of "prohibited transaction" is a "direct or indirect"

> "(A) sale or exchange, or leasing of any property between the plan and a party in interest;
>
> (B) lending of money or other extension of credit between the plan and a party in interest;

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[1] *See Commissioner of Internal Revenue* v. *Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 160 (1993) ("Before ERISA's enactment in 1974, the measure that governed a transaction between a pension plan and its sponsor was the customary arm's-length standard of conduct. This provided an open door for abuses such as the sponsor's sale of property to the plan at an inflated price or the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued or nonliquid.").

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, or any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a)."

ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), App. 74a.

The statute's definition of a "party in interest" with respect to an employee benefit plan is broad, encompassing service providers, plan fiduciaries, plan employees, employers and unions with covered employees, and certain relatives, owners, employees, officers, directors, share-holders and partners of the foregoing. ERISA § 3(14), 29 U.S.C. § 1002(14), App. 70a-72a.

Statutory prohibited transaction exemptions are set forth in ERISA § 408, 29 U.S.C. § 1108. Section 408(a), App. 75a, empowers the Secretary of Labor to grant additional exemptions after consultation and coordination with the Secretary of the Treasury.

A closely parallel scheme was also established in Section 4975 of the Internal Revenue Code ("IRC"), 26 U.S.C. § 4975, App. 66a-70a, which was enacted as part of ERISA. Under Section 4975, "prohibited transactions" (defined similarly but not identically to the definition in ERISA) between plans and "disqualified persons" (the counterpart to the similarly, but not identically, defined "party in interest" in ERISA) are barred unless covered by an exemption. A two-tiered excise tax is payable by any disqualified person, other than a fiduciary acting solely as such, who participates in the transaction: an annual tax of

(at present) 15% of the amount involved in the transaction and, if the transaction is not corrected upon notice, a further tax of 100% of the amount involved.[2] Statutory exemptions are set forth in Section 4975(d), and the Secretary of the Treasury is empowered in Section 4975(c)(2) to grant additional exemptions after consultation and coordination with the Secretary of Labor. *See also* ERISA § 3003(b), 29 U.S.C. § 1203(b) (Secretaries shall harmonize rules under ERISA § 406(a)(1) with those under IRC § 4975).

These prohibited transaction provisions lie at the core of ERISA's mission of protecting employee benefit plan assets and beneficiaries. *See, e.g., Commissioner of Internal Revenue* v. *Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 160 (1993).

B. ERISA § 502(a)(3)

Section 502 of ERISA addresses civil enforcement. Section 502(a), App. 76a, authorizes a variety of civil actions, including, in paragraph (3), the action brought here – a civil action by a fiduciary to obtain "appropriate equitable relief" to redress "any act or practice which violates" Title I

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[2] Section 502(i) of ERISA, 29 U.S.C. § 1132(i), gives the Secretary of Labor discretionary authority to impose a two-tiered civil penalty very similar to the IRC § 4975 excise taxes (except that the first tier is 5% of the amount involved in the transaction). Section 502(i) does not apply to a transaction "with respect to a plan described in section 4975(e)(1)" of the Internal Revenue Code, 29 U.S.C. § 4975(e)(1), whereas IRC § 4975 applies *only* to such plans. Section 4975 (e)(1) defines "plan," as relevant here, as a plan that, like the Ameritech plans, either is tax-qualified under the Internal Revenue Code or ever was determined by the Secretary of the Treasury to be tax-qualified. Whereas tax-qualified plans must be funded, non-qualified ERISA plans (such as welfare benefit plans) generally need not be.

(Sections 2-734) of ERISA. Paragraph (5) authorizes equivalent actions by the Secretary of Labor.

C. The Facts[3]

Petitioner Ameritech Corporation is the plan sponsor and plan administrator of pension plans for employees and retirees of Ameritech and its affiliates and subsidiaries. At all relevant times, petitioner Harris Trust and Savings Bank was the Trustee for the Ameritech Pension Trust, through which plans with some 118,000 beneficiaries are funded. Ameritech, as plan administrator, and Harris Trust, as trustee, were plan fiduciaries as defined in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), App. 73a.

Respondents Salomon Brothers Inc and Salomon Brothers Realty Corp. (collectively, "Salomon") were service providers to the plans. App. 2a. Salomon received hundreds of thousands of dollars per year in commissions and other compensation for securities brokerage and other services provided to the plans during the relevant years. Supplemental Appendix of Plaintiffs-Appellees in Court of Appeals (hereinafter, "C.A. Supp. App.") at 91-92, 419-56. As provider of these services, Salomon was a "party in interest" with respect to the plans within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14). The District Court found, however, that Salomon was not, by virtue of its

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[3] Some of the facts set forth herein are contested by Salomon. Because of the course that proceedings took below, the lower courts did not resolve such factual disputes. For purposes of resolving the question of law presented here, the facts as alleged by petitioners should be taken as proven. *Burlington Industries, Inc.* v. *Ellerth*, 118 S. Ct. 2257, 2262 (1998); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

provision of these services or of investment advice to the plans, a fiduciary of the plans. App. 20a-30a.

In the 1987-89 period, Salomon acted as placement agent for three issuances of mortgage notes by Motels of America, Inc., and one issuance of mortgage notes by Best Inns, Inc. In connection with each of these transactions, Salomon entered into a "Fee Agreement" with the issuer, under which, as consideration for its services, Salomon became entitled to fees based on a percentage of any "net cash flow" generated by the motels involved, plus a percentage of any appreciation of the motel properties upon maturity of the associated notes or sale of the properties. App. 2a.

During 1987-89, Salomon sold a 100% interest in one of the Fee Agreements and 95% interests in the other three Fee Agreements to the Ameritech Pension Trust for close to $21 million. App. 18a-19a. The purchases were directed by National Investment Services of America ("NISA"), an investment manager to which Ameritech had delegated investment discretion over a portion of the Trust's assets. C.A. Supp. App. 105-16; App. 42a. By virtue of its discretion over investment of plan assets, NISA was a plan fiduciary. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

Petitioners allege that Salomon failed to make timely disclosure of information it had as to the extreme riskiness, poor performance and low value of the Fee Agreements. App. 19a. Petitioners further maintain that the Fee Agreement sales were prohibited transactions, and did not qualify for any of the statutory or regulatory exemptions from prohibited transaction status. App. 30a-31a, 44a.

The Fee Agreements proved to be nearly worthless. App. 19a. Both issuers went into bankruptcy, and, after taking all reasonable steps to mitigate its losses, the

Ameritech Pension Trust lost $19,889,602 of the $20,915,000 it paid for these investments. C.A. Supp. App. 170, 177, 180. Salomon, which had a basis of zero in the Fee Agreements, reaped a profit of $20,915,000 from selling them to the Trust. C.A. Supp. App.105, 127-29, 393-95.

D. The Proceedings Below

Petitioners filed suit against Salomon in 1992, alleging claims under ERISA, RICO, and Illinois statutory and common law. The relevant claim for present purposes is Count II of the Second Amended Complaint, which asserts that, in selling the Fee Agreements to the Pension Trust, Salomon, a party in interest with respect to the plans, participated in a prohibited transaction under ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), and is liable to provide restitution to the Trust under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

Salomon moved for summary judgment dismissing Count II, contending that only fiduciaries that cause plans to enter into prohibited transactions, and not non-fiduciary parties in interest that participate in such transactions, can be liable under Section 502(a)(3) to provide appropriate equitable relief with regard to such transactions. The District Court denied the motion, and held, in line with all the courts of appeals that had addressed the issue, that Section 502(a)(3) authorizes suits against non-fiduciary parties in interest for "appropriate equitable relief," including restitution, in regard to their participation in Section 406(a)(1) prohibited transactions. App. 30a-41a. Subsequently, the District Court certified this question of law for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and the Seventh Circuit accepted the appeal.

The Court of Appeals reversed, creating a six-to-one circuit split on the vital question of employee benefit law

presented here. App. 1a-13a. In concluding that no cause of action will lie under ERISA § 502(a)(3) against non-fiduciary parties in interest to secure equitable relief for their participation in prohibited transactions, the Court of Appeals relied on the wording of ERISA § 406(a)(1), which it saw as limiting liability to fiduciaries, App. 7a-9a; on certain *dicta* in this Court's decisions in *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), and *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996), App. 9a-11a; and on selected legislative history, App. 11a-12a.

REASONS FOR GRANTING THE PETITION

A. The Circuit Courts Are Split

The Court of Appeals acknowledged that its decision created a split among the circuits. App. 13a n.1. Until the present decision, every one of the six courts of appeals that had addressed the question had held that non-fiduciary parties in interest that enter into prohibited transactions are subject to suit for equitable remedies under Section 502(a)(3) of ERISA:[4]

- First Circuit: *Reich* v. *Rowe*, 20 F.3d 25, 31-33 (1st Cir. 1994).

- Third Circuit: *Reich* v. *Compton*, 57 F.3d 270, 285-87 (3d Cir. 1995).

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[4] Some of the cited decisions involved Section 502(a)(5), relating to actions brought by the Secretary of Labor. The pertinent language of Section 502(a)(5) is identical to that of Section 502(a)(3), relating to actions brought by private parties, and this Court has recognized that the two provisions must be interpreted consistently. *See Mertens* v. *Hewitt Associates*, 508 U.S. at 260; *see also, e.g., Reich* v. *Compton*, 57 F.3d 270, 284 (3d Cir. 1995).

- Fourth Circuit: *LeBlanc* v. *Cahill*, 153 F.3d 134, 150-53 (4th Cir. 1998).

- Ninth Circuit: *Steen* v. *John Hancock Mutual Life Insurance Co.*, 106 F.3d 904, 917-18 (9th Cir. 1997); *Landwehr* v. *DuPree*, 72 F.3d 726, 733-34 (9th Cir. 1995); *Concha* v. *London*, 62 F.3d 1493, 1503-04 (9th Cir. 1995), *cert. dismissed*, 517 U.S. 1183 (1996); *Call* v. *Sumitomo Bank*, 881 F.2d 626, 634-35 (9th Cir. 1989); *Nieto* v. *Ecker*, 845 F.2d 868, 873-74 (9th Cir. 1988).

- Tenth Circuit: *Reich* v. *Stangl*, 73 F.3d 1027, 1029-34 (10th Cir.), *cert. denied*, 519 U.S. 807 (1996).

- Eleventh Circuit: *Herman* v. *South Carolina National Bank*, 140 F.3d 1413, 1419-22 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999).[5]

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[5] Many district courts have come to the same conclusion. *See, e.g., Quint* v. *Freda*, 1999 U.S. Dist. LEXIS 1384 (S.D.N.Y. Feb. 10, 1999); *Damasco & Associates 401(k) Profit Sharing Plan* v. *Manufacturers Life Insurance Co.*, 1999 U.S. Dist. LEXIS 13654, at *18-*20 (N.D. Cal. Aug. 20, 1999); *Liss* v. *Smith*, 991 F. Supp. 278, 306 (S.D.N.Y. 1998); *Herman* v. *Wolfe*, 1998 U.S. Dist. LEXIS 980, at *9-*10 (N.D. Ill. Jan. 22, 1998); *Mason Tenders District Council Pension Fund* v. *Messera*, 958 F. Supp. 869, 879 (S.D.N.Y. 1997); *Dietz* v. *Cahill*, 935 F. Supp. 223, 229-30 (W.D.N.Y. 1996); *Reich* v. *Polera Building Corp.*, 20 Empl. Ben. Cas. 1100 (S.D.N.Y. Feb. 9, 1996), *Cosgrove* v. *Circle K Corp.*, 915 F. Supp. 1050, 1065 (D. Ariz. 1995); *Reich* v. *Lancaster*, 843 F. Supp. 194, 203 (N.D. Tex. 1993); *Dole* v. *Compton*, 753 F. Supp. 563, 569 n.10 (E.D. Pa. 1990); *Framingham Union Hospital* v. *Travelers Insurance Co.*, 744 F.

(...footnote continued)

As the number of reported decisions suggests, the question at issue here has been thoroughly explored by the lower courts. There is therefore no reason to believe that this Court would benefit from deferring review in order to allow further litigation to develop. The considerations addressed by the Seventh Circuit in reaching its decision – statutory language, prior statements of this Court, and legislative history – are the identical considerations that have been extensively addressed in the many decisions that have come to a contrary conclusion.

Statutory Language. In concluding that non-fiduciary parties in interest are immune from suit as participants in Section 406(a)(1) prohibited transactions, the Seventh Circuit placed primary reliance on the fact that Section 406(a)(1) begins with the words, "A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . ." – followed by the five enumerated types of prohibited transaction, including two that are clearly applicable here, "sale or exchange, or leasing, of any property between the plan and a party in interest" and "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1). The Seventh Circuit concluded, based on the statute's reference to a fiduciary's causing a prohibited

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(. . . continued)
Supp. 29, 33 (D. Mass. 1990); *McDougall* v. *Donovan*, 539 F. Supp. 596, 599 (N.D. Ill. 1982).

We have been unable to locate any decision, other than decisions that were subsequently reversed, which reached the conclusion of the Seventh Circuit herein.

transaction, that Section 406(a)(1) imposes a duty *solely* on fiduciaries that cause plans to engage in such transactions, and that non-fiduciary parties in interest that enter into such transactions with plans *cannot* violate Section 406(a)(1). *See* App. 7a-9a.

What this overlooks, as the courts coming to the opposite conclusion have recognized,[6] is that in a prohibited transaction, a party in interest, which will often be a non-fiduciary, is *necessarily* a counter-party to the fiduciary that enters into the transaction on behalf of the plan. As a result, prohibiting the transaction from the fiduciary's side necessarily entails prohibiting it from the party in interest's side. It is the *transaction* that is prohibited.[7] As the Eleventh Circuit put it in *Herman* v. *South Carolina National Bank*, 140 F.3d at 1421:

> "While § 406 does instruct fiduciaries – typically the plan trustees – not to cause the plan to enter into transactions with 'parties in interest,' § 406 also serves to prohibit transactions between a [plan] and a 'party in interest.' Even if § 406 imposes an affirmative duty on fiduciaries not to cause the plan to enter into certain prohibited transactions, this in no sense lessens the fact that a transaction between a plan and a 'party in interest' remains a prohibited transaction under § 406."

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[6] *E.g.*, *LeBlanc* v. *Cahill*, 153 F.3d at 150-51, 153; *Reich* v. *Stangl*, 73 F.3d at 1031.

[7] Moreover, nothing in Section 406(a)(1) says that non-fiduciary parties in interest are *not* liable for participating in prohibited transactions.

See also Reich v. *Rowe*, 20 F.3d at 31 n.7; S. (Conf.) Rep. No. 1090, 93d Cong., 2d Sess. 306-20 (1974) (repeated statements that *transactions* are prohibited by Section 406).

Once it is recognized that Section 406(a)(1) prohibits *transactions*, it ineluctably follows that a prohibited transaction is, in the words of Section 502(a)(3), an "act or practice which violates any provision of this title."[8] It then further follows that *any* person, including a non-fiduciary party in interest, can be sued under Section 502(a)(3) to enjoin the transaction or "obtain other appropriate equitable relief."[9]

Other provisions of ERISA and the Internal Revenue Code – which must be read in parallel with ERISA §§ 406(a)(1) and 502(a)(3), *see, e.g.*, *Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972) ("individual sections of a single statute should be construed together") – confirm that this is the correct construction of those provisions:

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[8] This Court explained in *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996), that Section 502(a)(3) and its analogue for actions brought by the Secretary of Labor, Section 502(a)(5), create "two 'catchalls,' providing 'appropriate equitable relief' for 'any' statutory violation. This structure suggests that these 'catchall' provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Here, as in *Varity*, petitioners "must rely on [Section 502(a)(3)] or they have no remedy at all," and there is no "ERISA-related purpose that denial of a remedy would serve." *Id.* at 515.

[9] There is no dispute that, if an action under Section 502(a)(3) is available, the equitable remedies that can be had include restitution. *See, e.g.*, *Mertens* v. *Hewitt Associates*, 508 U.S. at 260; *LeBlanc* v. *Cahill*, 153 F.3d at 153; *Herman* v. *South Carolina National Bank*, 140 F.3d at 1422.

- *ERISA § 502(i).* That Section 406(a)(1) prohibits prohibited transactions and participation in them by parties in interest, and not just the participation of fiduciaries in such transactions, is made absolutely clear by ERISA § 502(i), 29 U.S.C. § 1132(i), App. 76a-77a, which provides: "In the case of a transaction prohibited by Section 406 by a party in interest with respect to a plan to which this part applies, the Secretary [of Labor] may assess a civil penalty against such party in interest." It is hard to imagine a clearer statement that Section 406(a)(1) prohibits *transactions,* and that parties in interest *are* subject to that prohibition.

- *ERISA § 408(a).* Again, the fact that *transactions*, not just *actions by fiduciaries*, are prohibited by Section 406(a)(1) is made clear in ERISA § 408(a), 29 U.S.C. § 1108(a), App. 75a-76a, which authorizes the Secretary of Labor to grant exemptions "of any fiduciary *or transaction*, or class of fiduciaries *or transactions*, from all or part of the restrictions imposed by section[] 406." (Emphasis added.)

- *Internal Revenue Code § 4975(h).* Still further confirmation that non-fiduciary parties in interest are subject to suit in connection with their participation in prohibited transactions is found in the parallel prohibited-transaction provisions of the Internal Revenue Code. As previously noted, Section 4975 of the Code, 26 U.S.C. § 4975, App. 66a-70a, provides, in subsections (a) and (b), for the imposition of excise taxes on "disqualified persons" who participate in prohibited transactions and are not acting solely in a fiduciary capacity. Subsection (h) of Section

4975 provides that before sending a notice of deficiency with respect to such a tax, the Secretary of the Treasury "shall notify the Secretary of Labor *and provide him a reasonable opportunity to obtain a correction of the prohibited transaction.*" (Emphasis added.) "Correction" is defined in paragraph (f)(5) as "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." As several courts have recognized,[10] an action under ERISA § 502(a)(5) – the provision that authorizes suits by the Secretary of Labor to remedy acts or practices that violate ERISA in terms substantially identical to the terms used in Section 502(a)(3) to authorize suits by private persons to remedy such acts or practices – is the only way that the Secretary of Labor could "obtain a correction" of a prohibited transaction by a non-fiduciary party in interest. Section 4975(h) thus necessarily recognizes that Section 502(a)(3) and (5) authorize suits against non-fiduciary parties in interest.

In short, one need not look beyond the words of ERISA and the Internal Revenue Code to conclude, as this Court did in *Commissioner of Internal Revenue* v. *Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993), that "Congress' goal [in enacting ERISA § 406(a)(1) and IRC

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10 *E.g., Reich* v. *Stangl*, 73 F.3d at 1034; *Reich* v. *Compton*, 57 F.3d at 286; *Nieto* v. *Ecker*, 845 F.2d at 874 n.6; *McDougall* v. *Donovan*, 539 F. Supp. at 599.

§ 4975] was to *bar categorically a transaction* that was likely to injure [employee benefit plans]" – not just to provide remedies against fiduciaries that cause such transactions to occur. 508 U.S. at 160 (emphasis added). And once it is established that such transactions are prohibited, it follows that parties in interest can be sued for appropriate equitable relief, including restitution, under Section 502(a)(3).

The Mertens and Lockheed Decisions. The lower courts have also thoroughly debated the significance, for the instant question, of this Court's decisions in *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), and *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996).

Mertens stated, in *dicta* that have been widely followed by the lower courts,[11] that no cause of action is available under ERISA against a non-fiduciary for assisting a fiduciary in violating its fiduciary obligations under the statute. The Seventh Circuit saw this statement as support for its conclusion that there is also no cause of action against a non-fiduciary party in interest for participation in a Section 406(a)(1) prohibited transaction.

The other decisions of the courts of appeals have squarely addressed and rejected this reading of *Mertens*. Every one of the six circuits that has reached a conclusion contrary to that of the Seventh Circuit in the instant case has issued a decision that post-dates and discusses *Mertens*. *Reich* v. *Rowe*, 20 F.3d at 31-33; *Reich* v. *Compton*, 57 F.3d at 285; *LeBlanc* v. *Cahill*, 153 F.3d at 151-53; *Landwehr* v. *DuPree*, 72 F.3d at 734; *Reich* v. *Stangl*, 73 F.3d at 1031-32;

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[11] *See Aull* v. *Cavalcade Pension Plan*, 988 F. Supp. 1360, 1365 (D. Colo. 1997) (citing cases).

Herman v. *South Carolina National Bank*, 140 F.3d at 1421-22. These decisions point out that the structure of ERISA's fiduciary-duty provisions, particularly Sections 405, 409 and 502(a)(2), 29 U.S.C. §§ 1105, 1109, 1132(a)(2), differs fundamentally from the structure of the provisions at issue here. In particular, because fiduciary violations do not have necessary counter-parties as prohibited transactions do, and because Congress specifically addressed only one type of involvement in fiduciary violations – co-fiduciary conduct (ERISA § 405, 29 U.S.C. § 1105) – while not addressing other types, *Mertens'* conclusion that there is no cause of action under ERISA for a non-fiduciary's participation in a fiduciary violation is in no way dispositive of the question presented here.

Indeed, the *Mertens* Court went out of its way to observe that Section 406 is a provision that can be read as "imposing obligations upon nonfiduciaries" (508 U.S. at 253-54 & n.4), and took pains to *contrast* the treatment of non-fiduciary parties in interest under Sections 406 and 502 from its holding as to liability for participation in fiduciary violations:

> "Professional service providers such as actuaries . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975; and (assuming non-fiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees."

508 U.S. at 262.[12]

Lockheed contains a footnote harmonizing these *dicta* from *Mertens* with *Lockheed*'s holding that, by the terms of Section 406, prohibited transactions must be transactions caused by fiduciaries. *See* 517 U.S. at 889 n.3. (The present transactions satisfy that causation requirement, because NISA, as investment manager with discretionary authority over investment decisions, was a fiduciary and caused the transactions to occur.) Though the Seventh Circuit strained to find support for its decision in this footnote (*see* App. 10a-11a), and post-*Lockheed* decisions of other courts have strained in the opposite direction (*see, e.g.*, *LeBlanc* v. *Cahill*, 153 F.3d at 152; *Herman* v. *South Carolina National Bank*, 140 F.3d at 1422 n.14), the *Lockheed* footnote is perhaps best read as favoring neither side of the present dispute. On the one hand, it does observe that the *Mertens* comments were *dicta*, but on the other hand, it also recognizes that a number of courts of appeals have relied on those *dicta* as support for finding a cause of action against parties in interest that participate in prohibited transactions, and it does not suggest that those courts were in error.

Legislative History. The Seventh Circuit placed substantial reliance on the fact that one of the two bills that were substantially rewritten in conference to become ERISA – the Senate bill – had a provision, not ultimately enacted, that would have specifically imposed liability on parties in interest for participating in prohibited transactions. *See* App. 12a; H.R. 2, § 511, 93d Cong., 2d Sess. (adding Section 15(i)

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12 The answer to the Court's caveat as to whether non-fiduciaries can be sued under Section 502(a)(3) is that nothing in that statutory provision restricts to only fiduciaries (or restricts in any other way) the categories of persons that can be sued to redress an "act or practice which violates" ERISA Title I.

to Welfare and Pension Plans Disclosure Act) (as passed by the Senate on Mar. 4, 1974), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974*, at 3780 (Senate Comm. Print 1976) ("*Legislative History*"). But the court ignored the counter-point that was presented to it on briefs: that the conferees, in moving away from highly particularized enforcement provisions, adopted Section 502's broad enforcement language, which expanded on *both* the Senate and House bills and specifically added the authorization of "other appropriate equitable relief" for *any* "act or practice that violates" the statute. *Compare* H.R. 2, § 503(e), 93d Cong., 2d Sess. (as passed by the House on Feb. 28, 1974), *reprinted in* 3 *Legislative History* at 4047, *and* H.R. 2, § 693, 93d Cong., 2d Sess. (as passed by the Senate on Mar. 4, 1974), reprinted in 3 *Legislative History* 3816-17, *with* ERISA § 502(a). *See also* H.R. (Conf.) Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974) (conferees expanded Section 502 to allow "an action for breach of a fiduciary duty *or* to enjoin any act or practice which violates the provisions of title I of the Act *or* to obtain any other appropriate relief to enforce any provision of that title") (emphasis added); *Reich* v. *Stangl*, 73 F.3d at 1032-34 (legislative history repeatedly stresses policy of protecting plan assets).

Sensible Statutory Construction. Statutes should be construed, where the language permits, to make sense – to advance in a sensible way the basic policies sought to be promoted by the overall statutory scheme, and not to clash with them for no good reason. *E.g., Varity Corp.* v. *Howe*, 516 U.S. at 513; *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993); *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 455 (1993). The courts that have found a cause of action to be available under Section 502(a)(3) (and (5)) against non-fiduciary parties in interest that participate in prohibited transactions

have stressed that it is improbable that Congress could have intended to exclude such a cause of action, as the result would potentially be to make it "difficult or impossible to undo such illegal transactions." *Nieto* v. *Ecker*, 845 F.2d at 874; *accord*, *LeBlanc* v. *Cahill*, 153 F.3d at 152-53; *Reich* v. *Compton*, 57 F.3d at 286.[13] Though they were drawn to its attention, the Seventh Circuit disregarded such considerations of sensible statutory construction.

* * *

In sum, the circuit split in the present action reflects fully-developed positions and counter-positions on a key issue of statutory interpretation. The Court should grant certiorari to resolve this important disagreement among the circuits.

B. The Question Presented Is of the Utmost Importance to the Administration of Employee Benefit Plans and the Vindication of Plan Beneficiaries' Rights

The question presented here has, as we have seen, been extensively litigated, reflecting its great and continuing

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13 *See also*, *e.g.*, *Reich* v. *Stangl*, 73 F.3d at 1031 ("It would make little sense to grant the Secretary [the] broad enforcement powers [of Section 502(a)(5)] to stop ongoing violations of ERISA and then to limit the Secretary's power to recover plan assets acquired through these same violations. Such an interpretation of section 502(a)(5) would effectively create a zone of immunity, protecting the illegitimate gains of parties in interest who have completed prohibited transactions that the Secretary could have enjoined while they were occurring."); *Landwehr* v. *DuPree*, 72 F.3d at 734 ("It is one thing to suggest, as does *Mertens*, that a nonfiduciary may not to be held liable for participating in another's breach of fiduciary duty. It is quite another to say that a non-fiduciary may not be held liable for his own wrongful conduct . . . .").

importance to the administration of employee benefit plans throughout the nation. Controlling prohibited transactions through a flat, broad prohibition, tempered by the careful granting of exemptions, was one of the fundamental purposes for which ERISA was enacted in 1974.

The Seventh Circuit's decision, by rendering non-fiduciary parties in interest within the jurisdiction of that circuit effectively immune from the civil recovery of ill-gotten gains – at the instance of *either* the victimized plan or its beneficiaries or fiduciaries *or* the Secretary of Labor – would open a loophole that could undermine that basic policy goal.[14] The party in interest will often be the only party with significant assets. Yet, civil recovery from that party – the party capable of undoing the wrong, and, often, the party most responsible for the wrong – will be stymied. As a result of ERISA's broad pre-emption of state law, ERISA § 514, 29 U.S.C. § 1144, plan beneficiaries may well be left without *any* remedy – a worse position than they would have been in had ERISA never been enacted.

There is also a clear need for nationwide uniformity in employee benefit plan policy. Many plans have nationwide or extensive multistate operations. Employee benefit plans should not have to adopt one set of enforcement policies for the Seventh Circuit and another for the rest of the country. And employees' and retirees' rights should not

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14 Eliminating private civil remedies would still leave it open for the government to seek to undo prohibited transactions through ERISA § 502(i) penalties or IRC § 4975 excise taxes, depending on the type of plan involved. *See* page 5, note 2 *supra*. But the government's enforcement resources are limited. The incidence of unremedied prohibited transactions is sure to be reduced if the parties with the greatest incentive to secure relief – the affected plan, and its beneficiaries and fiduciaries – are able to sue for restitution.

depend on vagaries of geography or available venues (*see* ERISA § 502(e), 29 U.S.C. § 1132(e)).

These considerations, too, weigh strongly in favor of granting certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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